BRB No. 02-0242 BLA

MOLLIE SEXTON (Widow of JAMES G. SEXTON) Claimant-Respondent v. PARAMOUNT COAL CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order B Awarding Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Timothy W. Greshman (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order B Awarding Benefits (00-BLA-1059) of Administrative Law Judge Edward Terhune Miller on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. '901 *et seq*. (the Act).[1] The administrative law judge noted that employer stipulated that the miner[2] worked for it for twenty-six years and eight months, and that the miner had simple coal workers' pneumoconiosis which arose out of his coal mine employment. The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(2), but found that claimant did not establish that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c)(1) or (c)(2). However, the administrative law judge found the evidence sufficient to establish the existence of complicated pneumoconiosis and, therefore, found that claimant is entitled to the irrebuttable presumption of death due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. '921(c)(3), as implemented by 20 C.F.R. '718.304. Thus, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304. Claimant responds, urging affirmance of the administrative law judge=s award of benefits. Employer has filed a reply brief disagreeing with claimant=s arguments. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.[3]

The Board=s scope of review is defined by statute. The administrative law judge=s Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. '921(b)(3), as incorporated

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant is Molly Sexton, the widow of James G. Sexton, Sr., the miner. The only claim before the Board is a survivor=s claim.

[3] We affirm the administrative law judge=s finding that the existence of pneumoconiosis is established pursuant to 20 C.F.R. '718.202(a)(2), and his findings that the miner=s death was not due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c)(1) or (c)(2), as these findings are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

by 30 U.S.C. '932(a); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Before determining whether invocation of the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. '921(c)(3), as implemented by 20 C.F.R. '718.304,[4] has been established, the administrative law judge shall first determine whether the evidence in each category under Section 718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis and then all relevant evidence pursuant to Section 718.304(a)-(c) must be considered and weighed together, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). However, the irrebuttable presumption under Section 411(c)(3) of the Act does not refer to the triggering condition for invocation of the presumption as Acomplicated pneumoconiosis,@ but rather the presumption is triggered by the application of congressionally defined criteria, *see Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B*

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[4] 20 C.F.R. '718.304, which implements the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. '921(c)(3), provides, in relevant part:

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that the miner=s death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic disease of the lung which:

(a) When diagnosed by chest X-ray Y yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C; or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraphs (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. '718.304.

Mining, Inc. v. Blankenship, 177 F.3d 240, ___ BLR ___ (4th Cir. 1999). Thus, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the irrebuttable presumption at Section 411(c)(3) of the Act provides three different ways of establishing the triggering condition and thus requires that the administrative law judge make an equivalency determination to make certain that regardless of which diagnostic technique is used, the same underlying condition triggers the presumption, *i.e.*, if a diagnosis is by biopsy or autopsy, a miner must have Amassive lesions@ which would, if x-rayed, show as opacities greater than one centimeter in diameter, *see Blankenship, supra*.

In the instant case, the administrative law judge reviewed the medical evidence of record in conjunction with the decision of the Fourth Circuit in *Blankenship*. The administrative law judge stated:

> In considering the totality of the evidence, this tribunal is persuaded that the Claimant has established the presence of massive lesions as required under the irrebuttable presumption of subsection 718.304(b). While Dr. Naeye was reluctant to speculate as to what size the massive lesions[5] found on autopsy would appear on chest x-ray, the lesions in this case were up to two centimeters in diameter, double the equivalency size of one centimeter as required under subsection 718.304(a). The chest x-ray readings, as noted above, did not find any evidence of pneumoconiosis despite the findings of extensive bilateral anthracosis on autopsy. As noted by Dr. Naeye, x-ray reports are recognized as under-reporting the presence of coal workers' pneumoconiosis. This tribunal finds that under the circumstances of this case, the x-ray reports are outweighed by the more probative findings on autopsy. Initially, this tribunal notes that the findings on autopsy of extensive bilateral anthracosis compatible with coal workers' pneumoconiosis are more credible than the negative x-ray reports since the findings of anthracosis are based on both a gross and microscopic examination of the miner=s actual lungs. In addition, the x-ray reports consistently diagnosed possible tuberculosis while the miner actually suffered from aspergillus with no tuberculosis or cancer present as determined by the autopsy examination. Thus, very

[5] Although the administrative law judge refers to Amassive lesions,@ we note that none of the physicians use this term to describe the miner=s pneumoconiosis.

little weight is accorded the negative chest x-ray readings, although it may be reasonably inferred from the medical literature referenced by the Court in *Double B Mining* and Dr. Naeye=s explanation for the smaller image on x-ray that, had the two centimeter lesions disclosed by the autopsy registered on the x-rays, they would have measure at least one centimeter in diameter.

This tribunal also notes Dr. Naeye=s analysis of the miner=s pneumoconiosis was inconsistent. At one point he agreed that a major abnormality on the autopsy findings has (sic) the silicotic lesions that are definitely evidence of simple coal workers' pneumoconiosis. At another point, he stated that the lesions did not show up on the x-ray reports and, thus, the lesions were not significant in number based on the negative x-ray reports. However, he did not explain the inconsistency with his earlier statement that the lesions were present in sufficient degree to constitute a Amajor finding@ on autopsy. Dr. Naeye did acknowledge that pneumoconiosis is often underrepresented on x-ray reports. Based on the unreliability of the x-ray reports, the inconsistency of his statements, and in consideration of Dr. Naeye=s own statement that the x-ray reports often underrepresent the presence of coal workers' pneumoconiosis, this tribunal finds Dr. Naeye=s analysis of the miner=s pneumoconiosis less persuasive than the findings presented by Dr. Coogan on autopsy. However, his opinion that the lesions were of sufficient size to qualify as complicated pneumoconiosis under the regulations is obviously an important positive indication.

On consideration of all these factors, this tribunal finds the initial autopsy finding of massive lesions, some of which reached two centimeters in diameter, is not contradicted by the other evidence of record and this finding is supported by the actual autopsy findings. Furthermore, the size of these lesions in this case are at least two centimeters as compared with the lesions just barely larger than one centimeter described in *Double B. Mining, Inc.* This tribunal finds the two centimeter lesions reported on autopsy equivalent to the one centimeter large opacities discussed in subsection 718.304(a). Accordingly, this tribunal finds the Claimant can invoke the irrebuttable presumption of death due to pneumoconiosis under

> subsection 718.304(b). Dr. Naeye=s discussion of the distinction between massive lesions due to complicated pneumoconiosis and massive lesions due to simple coal workers' pneumoconiosis is helpful in understanding the disease etiology. However, the regulations at subsection 718.304 makes no distinction between lesions due to simple coal workers' pneumoconiosis or complicated coal workers' pneumoconiosis. Under these circumstances, therefore, this tribunal finds the Claimant is entitled to survivor=s benefits since she has established the presence of massive lesions under subsection 718.304(b) which are equivalent to the requirements set forth in subsection 718.304(a).

Decision and Order at 8-10.

The record contains forty-three interpretations of x-ray films taken on twenty-two different dates from 1980 through 1999. While some of these readings noted problems in the miner=s lungs, none of these readings noted opacities greater than one centimeter. *See* Director's Exhibits 13-20, 32; Employer's Exhibits 1-3, 7-10, 12-13, 19-20, 22, 24-31.

The death certificate, signed by Dr. Baronagan states that the immediate cause of death was a cerebro-vascular accident due to right carotid artery thrombosis. The death certificate lists left broncho pneumonia and right sided CHF as other significant conditions contributing to death, but not resulting in the underlying cause. Director's Exhibit 8.

The miner=s autopsy was performed by Dr. Coogan. In the gross description of the miner=s respiratory system, Dr. Coogan states:

> Within the right apex, there is a broad irregular scar associated with parenchymal scarring and cyst formation. Around this area, there is prominent paraseptal anthracosis with macule formation. These macules coalesce, occasionally reaching a diameter of 2 cm. This area is essentially confined to the apex grosslyY.The left lung exhibits severe, dense adhesions, involving the upper half of the upper lobe. There is apical scarring with cyst formation and prominent coalescing macule formationY.

Director's Exhibit 10. Dr. Coogan=s microscopic description of the miner=s respiratory system indicates that in the right lung AThere is multiple, variably-sized, densely hyalinized macules

which coalesce. These are associated with anthrasilicotic pigment deposition. These findings are consistent with coal worker=s pneumoconiosis.@ Director's Exhibit 10. Dr. Coogan also opined that the sections from the left lung Aalso show multiple hyalinized anthrasilicotic macules consistent with coal worker=s pneumoconiosis.@ Director's Exhibit 10. In a letter to claimant, Dr. Coogan stated AIn summary, the findings show that the miner had pneumonia, but that he died of a stroke. There was also evidence of black lung disease.@ Director's Exhibit 9.

Dr. Naeye reviewed the medical evidence and the autopsy slides. Dr. Naeye provided a report dated May 2, 2000. Dr. Naeye stated:

> the major abnormality in these lungs is silicotic lesions that exceed 1cm and may reach 2 cm in diameter. Although they do not resemble complicated coal worker=s (sic) pneumoconiosis (CWP) in their histologic features or pathogenesis they meet a current definition of complicated CWP for legal purposesY.In summary, pulmonary findings in this man meet the current Dept of Labor criteria for complicated coal workers' pneumoconiosis.

Director's Exhibit 11. In his deposition taken on September 29, 2000, Dr. Naeye opined that the miner had simple coal workers' pneumoconiosis and stated that the lesions that are characteristic of complicated coal workers' pneumoconiosis are not present in this case. Dr. Naeye indicated that the silicotic lesions that are seen on x-ray would Aprobably not@ be seen on x-ray as greater than one centimeter. Dr. Naeye also explained that a slide and cover slip will not permit measurement of a lesion that is more than 1.1 or 1.2 centimeters in diameter. Dr. Naeye strongly disagreed with claimant=s counsel=s statement that it is commonly recognized that once a lesion reaches two centimeters in diameter, it is consistent with a diagnosis of progressive massive fibrosis. Dr. Naeye opined that complicated coal workers' pneumoconiosis is a disease that continuously expands, while simple coal workers' pneumoconiosis is static, and it stops changing when exposure ceases. Dr. Naeye stated that when coal workers' pneumoconiosis micronodules come together, even if it reaches two centimeters, it is not complicated coal workers' pneumoconiosis. Dr. Naeye also stated that a lesion that appears on an x-ray as one centimeter actually has a larger physical presence. Employer's Exhibit 23.

Employer asserts that the administrative law judge erred by not considering all of the x-

ray evidence, specifically referring to Dr. Barrett=s x-ray interpretations.[6] While the

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The record contains Dr. Barrett=s

interpretations of the x-rays taken Dr

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Director's Exhibit

administrative law judge did not detail the x-ray evidence of record, he did comment that the record contained x-rays from 1980 through 1999, and he stated that the more recent Afilms were re-read by several board-certified radiologists and B-readers on behalf of the Employer,@ and noted that the re-readings all found no evidence of pneumoconiosis. Decision and Order at 6. Employer contends that Dr. Barrett=s re-readings were requested and submitted by the Director, and not employer, contrary to the administrative law judge statement. Since the administrative law judge=s characterization of the x-ray evidence as containing no opinions diagnosing pneumoconiosis is accurate, we hold that the administrative law judge=s misstatement regarding the party who submitted Dr. Barrett=s opinion into evidence does not constitute reversible error, s*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer asserts that the administrative law judge erred by improperly substituting his opinion for that of the physicians when he determined that the lesions observed on autopsy would have appeared on x-rays as opacities greater than one centimeter, despite the interpretations of the B readers and Board-certified radiologists that the x-rays did not show evidence of pneumoconiosis. Specifically, employer contends that since no physician opined that the autopsy lesions would appear as greater than one centimeter on x-ray and no physician interpreted any x-ray as showing opacities larger than one centimeter, the record does not contain evidence to support the administrative law judge=s determination.

As a preliminary matter, we affirm the administrative law judge=s discrediting of Dr. Naeye=s opinion as this finding has not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, a review of the record indicates that there is no medical opinion evidence regarding the equivalency of the lesions observed on autopsy when viewed by x-ray. The administrative law judge=s determination that the evidence is sufficient to trigger the presumption was based on a medical determination by the administrative law judge which is beyond the purview of his duties as the finder-of-fact. *See generally Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Consequently, as the record does not contain evidence to support such a finding, we reverse the administrative law judge=s determination that claimant has established invocation of the presumption of death due to pneumoconiosis contained in Section

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718.304. *See Scarbro, supra*; *Blankenship, supra*; *see also Riddle v. Director, OWCP,* No. 95-1292 (6th Cir. Dec. 6, 1995)(unpub.). We therefore reverse the award of benefits.

Accordingly, the administrative law judge=s Decision and Order B Award of Benefits is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge